[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1432

UNITED STATES OF AMERICA,
Plaintiff, Appellee

v.

PAUL C. NORDBERG,
Defendants, Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, United States District Judge]

Before
Torruella, Chief Judge,
Cyr and Stahl, Circuit Judges

Paul C. Nordberg on brief pro se.
Loretta C. Argrett, Assistant Attorney General, William S. Estabrook, Thomas V.M. Linquanti, Tax Division, Department of Justice, and Donald K. Stern, United States Attorney, on brief for Appellant

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October 10, 1996

Per Curiam. We have reviewed de novo the district court's grant of summary judgment in favor of the plaintiff-appellee. We conclude that the determination was correct and see no need to write separately. We, therefore, affirm, essentially for the reasons stated in the district court's memorandum and order, dated April 8, 1996. We add only the following comments.

At page 6 of its memorandum and order, the district court made a slip of the pen. In reciting the summary judgment standard, the court stated that it must view the entire record in the light most favorable to the "plaintiffs" and indulge all reasonable inferences in their favor. In this case, the government was the plaintiff and the moving party. Obviously, the district court meant to refer to the "defendants," as the non-moving party. It is clear from the next paragraph and the remainder of the opinion that the district court understood the relative burdens of the moving and non-moving parties, understood which party carried which burden in this case, and applied the correct standard. Contrary to the appellants' attempt to create an issue that does

not exist, the district court did not "reverse the rule for inferences." Brief at p. 35.

In addition, we note that the government has conceded that, because it has already applied the appellants' income tax overpayments for the tax years 1991 and 1992 to the balance it claimed the appellants owed for the tax year 1987, the amount of these overpayments was properly credited to the amount owed by the taxpayers.

Appellants' request for oral argument is denied. The alternate request that we accept supplemental material in lieu of oral argument is denied. The supplemental materials should have been included within the permitted number of pages in the reply brief. In any event, we have reviewed this supplemental material and it does not change our decision.

The "emergency motion" is denied as moot.

Affirmed. Loc. R. 27.1

APPENDIX - NORDBERG V. UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1432

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

PAUL C. NORDBERG
Defendant - Appellant

JUDGMENT

Entered: October 10, 1996

This cause come on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court
William H. Ng - Clerk

CC: Paul Nordberg, Pro se
Loretta C. Argrett, Esq.
William S. Estabrook, Esq.
Thomas V.M. Linguanti, Esq.
Donald K. Stern, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff v. PAUL C. NORDBERG and DEBRA L. NORDBERG, Defendants	Civil Case No. 93-12681- NMG

MEMORANDUM AND ORDER

GORTON, J.

There are five motions currently pending before this Court in the above-titled civil action: 1) defendants' motion for judgment on the pleadings [Docket #11], 2) plaintiff's motion for partial summary judgment on defendants' counterclaim [#12], 3) defendants' motion to compel [#17], 4) plaintiff's motion for a protective order [#18] and 5) plaintiff's motion for partial summary judgment [#20]. For the reasons that follow, the defendants' motion to compel will be denied and plaintiff's motion for summary judgment will be allowed; the remaining motions will, therefore, be denied as moot.

I. Introduction

On December 9, 1993, the United States government field this civil action, pursuant to 26 U.S.C. # 7405, to collect what it asserts was an erroneous refund paid to defendants. Section 7405 provides that "[a]ny portion of a tax imposed by this title, refund of which is erroneously made,...may be recovered by civil action brought in the name of the United States." The dispute arises out of defendants' 1987 tax return, which was the subject of a lengthy IRS adult that lasted until May, 1990. The issue in the case is whether the defendants' treatment of their 1987 securities trading losses on their 1987 tax return was erroneous as a matter of law.

Although an initial "Audit Report" issued by the IRS to the Nordbergs in May, 1990. indicated no deficiency, the agency later alleged a deficiency of $30,665, plus interest. By December 10, 1991, defendant paid, under protest, the entire amount of the alleged deficiency.

In later December, 1991, the IRS issued a check payable to defendants for $45,188.25 as a refund for overpayment of their 1987 taxes. In May, 1992, however, the IRS informed defendants

that the refund was erroneous and requested repayment. Defendants, claiming that the refund was owed to them, refused to return the money. Subsequently, the IRS refused to refund defendants' claimed overpayments on their 1991 and 1992 tax returns but instead applied these amounts ($2,430 and $5,317, respectively) to the claimed outstanding liability.[1]

On December 9, 1993, the United States filed the instant suit to recover the amount of the erroneous refund plus statutory interest. The defendants filed an answer and counterclaim on December 29, 1993, seeking return of the money held by the IRS as credits towards repayment of the alleged deficiency.

II. **Defendants' Motion to Compel [Docket #17]:**

Defendants' motion to compel asserts that the government has repeatedly objected to and declined to answer requests for admissions and

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[1] The IRS withheld the later refunds pursuant to 26 U.S.C. #6402(a), which provides that "[i]n the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment...."

interrogatories concerning various aspects of the IRS' audit of their 1987 tax return. The importance of the audit, at least to the defendants, is further evidenced by their expressed desire to depose IRS employees involved during the process, which has led the government to file a motion for a protective order. The government responds that, in light of the sole issue at stake in the underlying action, the defendants' requests for admissions and production of documents fail to satisfy the requirements of Fed.R.Civ.P. 26(b). This Court agrees.

Resolution of the case at bar turns solely on the specific issue of whether the Nordbergs' treatment of their 1987 treading losses was erroneous as a matter of law. Their discovery requests seek to obtain information about the reasoning and processes by which IRS employees involved in the audit of the taxpayers' return decided to assess the tax liabilities with respect to their trading transactions. The discovery does not relate to the facts existing during 1987, upon which the IRS determinations were based. In light of the principal that a challenge to a tax determination results in a trial de novo rather than a review by this Court of an existing administrative record, the

defendants' discovery requests fail to satisfy the mandate of Fed.R.Civ.P. 26(b) that information sought to be discovered be relevant or "reasonably calculated to lead to the discovery of admissible evidence." See, e.g. Lewis v. Reynolds, 284 U.S. 281, 283 (1932); Ruth v. United States, 823 F.2d 1091, 1094 (7th Cir. 1987) ("courts conduct a de novo review of the... assessment"); Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 328 (1974) (a court's determination as to a taxpayer's liability "must be based on the merits of the case and not on any previous record developed at the administrative level.").

The information sought by defendants which forms the basis for the motion to compel is, therefor, evidence which would not be relevant to determining their 1987 tax liability. Information about people who participated in the audit is not relevant, nor are notes made by IRS employees during the audit. Indeed, the audit of the Nordbergs' 1987 tax return took place well after the tax year at issue. In short, the information requested by defendants has no bearing on the sole issue in the case at bar because the Nordbergs' ultimate tax liability is not influenced by the IRS' conduct or findings during the audit. In rejecting a similar

argument, one District Court denied a motion to compel upon observing that:

> the opinions, impressions, conclusions and reasoning of IRS agents are irrelevant to the validity of the assessment against [the taxpayer]....Resolution of the [] issues depends solely on application of the pertinent law to the facts of [the] case....[T]he opinions of individual IRS agents regarding their propriety is immaterial.

Garity v. United States, 81-2 U.S.T.C. (CCH) P 9599, 1980 WL 1765 at *2 (E.D. Mich. May 20, 1980). Similarly, the Southern District of New York has recognized that:

> [t]he subjective analysis of the agent and technical advisor based upon the information derived from [taxpayer's] records and their respective opinions as to the proper method to be appllied in determining whether taxes are due form no part of the [taxpayer's] case. While no doubt disclosure of such information would be on interest to [taxpayer], it is not essential nor required for proper

preparation.

Detroit Screwmatic Co. v. United States, 49 F.R.D. 77, 79 (S.D.N.Y. 1970)

Furthermore, if the Nordbergs' treatment of the trading losses on their 1987 tax return was erroneous as a matter of law, they are liable regardless of what an IRS agent, at any time, may have thought. See United States v. Tuthill, 55 F.2d 415, 416 (7th Cir. 1931); United States v. Ellis, 154 F. Supp. 32, 38 (S.D.N.Y. 1957), aff'd, 264 F.2d 325 (2nd Cir. 1959); see also Flamingo Fishing Corp. v. United States, 31 Fed. Cl. 655, 658 (1994) (where the Court of Claims allowed the government's motion for protective order precluding taxpayer from deposing IRS agents because agents' opinions and conclusions regarding the applicable Code provisions were irrelevant to the determination of the case). Accordingly, defendants' motion to compel will be DENIED.

III. Plaintiff's Motion for Partial Summary Judgment [Docket #20]:

The government has also filed a motion for "partial summary judgment on the issue of the nature of the defendants' losses from trading in 1987." In the memorandum in support of its

motion, the government enumerates the "questions presented" to the Court as: 1) whether Paul Nordberg was a trader or a dealer with respect to the options he traded in 1987, and, accordingly, 2) whether the losses from the trading activity are properly capital or ordinary. The Nordbergs vigorously contest the government's assertion that there is no genuine issue of any material fact with respect to the nature of the losses, and, therefor, it is important for this Court to identify precisely the material facts upon which plaintiff bases its motion.

A. The Summary Judgment Standard

Summary judgment shall be rendered where the pleadings, discovery on file and affidavits, if any, show "there is no genuine issue of material fact and...the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). This Court must view then entire record in the light most favorable to the plaintiffs and indulge all reasonable inferences in their favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993).

With respect to a motion for summary judgment, the burden is on the moving party to show that "there is an absence of evidence to

support the non-moving party's case." FDIC v. Municipality of Ponce, 904 F.2d 740, 742 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett. 477 U.S. 317, 325 (1986)). If the moving party satisfies that burden, it shifts to the non-moving party to establish the existence of a genuine material issue. Id. In deciding whether a factual dispute is genuine, this Court must determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmovant's assertion of mere allegation or denial of the pleadings is insufficient on its own to establish a genuine issue of material fact. Fed.R.Civ.P. 56(e).

B. Material Facts

On their joint income tax return for 1987, the Nordbergs reported, on Schedule "C" (entitled "Profit of (Loss) from Business or Profession"), a loss of $86,821.86. According to a letter written by Paul Nordberg to the Internal Revenue Service, those losses resulted from his trading of securities called "OEX options," which are "puts" and "calls" indexed to a basket of stocks in the Standard & Poor's 100. In response to the United States' Requests for Admissions, Paul Nordberg admitted that his

trading of securities in 1987 was done "exclusively for an account" in the Nordbergs' name at Shearson, Lehman Brothers. Government Exhibit 9 at p. 4.

Moreover, Mr. Nordberg admitted that he was aware of no facts or evidence that in 1987 he ever traded securities except through a "securities exchange," assuming that that term encompasses the Chicago Board of Exchange. Id. at pp. 5-6. By reporting the losses on a Schedule C form, the Nordbergs claimed the entire trading loss as an ordinary business loss. An audit by the IRS followed, with which the defendants cooperated fully.

At the conclusion of the exhaustive audit, the only unresolved substantive issue was whether Paul Nordberg's trading losses for the 1987 tax year were capital or ordinary. Indeed, in a letter to the IRS dated May 8, 1989, Mr. Nordberg wrote that:

> [T]he only material, unresolved matter is the proper treatment...of Nordberg's trading of securities.... The issue to be determined is whether Nordberg is limited to a maximum "Capital Loss" deduction of $3,000 (for 1987) or is

> entitled to treat the entire net trading loss in 1987 as the loss incurred in a "business" or "trade", and therefor [sic] deductible in its entirety in 1987.

Government Exhibit 2, p 2.

According to an "Income Tax Examination Changes" form dated July 11, 1990, the IRS changed the characterization of the Nordbergs' 1987 loss to a capital loss. Government Exhibit 3. Consequently, the IRS proposed a deficiency of $30,665, plus interest, for a total of $44,015.70. In November and December of 1991, the defendants made payments by check in the amount equal to the total assessment plus interest.

By what the IRS admits was mistake, it issued a refund check to the Nordbergs on December 20, 1991, for $45,188.25, representing the payments made by defendants plus $388.25 in interest. Government Exhibits 4, 6. In early 1992, the IRS sent the defendants a notice that 1) informed them that the refund check had been issued erroneously, and 2) requested repayment. Government Exhibit 7. By letter dated February 14, 1992 to the IRS Center Director, the

Nordbergs informed the Service that they would not return the money. The government then commenced the pending lawsuit.

C. Legal Analysis

Sections 165(a) and (c) of the Internal Revenue Code permit individuals to deduct losses incurred in a trade or business or in a transaction entered into for a profit. 26 U.S.C. Section 165(a), (c). Section 165(f) provides, however, that capital losses are deductible only to the extent allowed by sections 1211 and 1212. Under section 1211, an individual's capital losses are deductible only to the extent of capital gains, plus $3,000 of ordinary income.

Section 1221 of the Code broadly defines the term "capital asset" as "property held by the taxpayer (whether or not connected with his trade or business)," and then narrows that definition by enumerating various exceptions. The relevant provision in the case at bar is section 1221(1), which excludes from the definition of capital assets:

> stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the

> taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business [.]

26 U.S.C. #1221(1).

In the case at bar, the government maintains that 1) Paul Nordberg was a trader in securities (as opposed to a dealer) who engaged in securities transactions entirely on his own account and lacked "customers," and 2) he cannot, therefore, invoke the exception to the definition of capital asset provided by #1221(1). The government asserts that the Nordbergs' 1987 losses were therefore capital in nature and, accordingly, they must repay to the United States "the portion of the refund attributable to the disallowance of the Nordberg's ordinary loss claim." Government memorandum at 14.

To determine whether securities constitute "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," see #1221(1), courts have identified three classifications of purchasers of securities: dealers, traders and investors.

E.g., United States v. Wood, 943 F.2d 1048, 1051 (9th Cir. 1991); King v. Commissioner, 89 T.C. 445, 457-458 (1987). Of those three classifications, only the first two are relevant to the case at bar. "The tax liability of a seller of securities depends upon which classification best identifies the seller; dealers may qualify for [the #1221(1) exception], while traders and investors do not." Wood, 943 F.2d at 1051.

The critical issue in distinguishing between dealers and traders is whether the taxpayer has "customers." Wood, 943 F.2d at 1050-1053. The United States Tax Court explained that a "dealer" is a person who purchases securities or commodities with the expectation of realizing a profit

> not because of a rise in value during the interval of time between purchase and resale, but merely because they have or hope to find a market of buyers who will purchase from them at a price in excess of their cost. Their excess or mark-up represents renumeration for their labors as a middle-man bringing together buyer and seller, and performing the usual services of

retailer or wholesaler of goods.

Kemon v. Commissioner, 16 T.C. 1026, 1032-1033 (1951). The Kemon Court thus employed a "merchant" analogy to determine whether a seller of securities is a dealer who sells to "customers" for purposes of section 1221. See id.; See also Wood, 943 F.2d at 1051; United States v. Diamond, 788 F.2d 1025, 1029 (4th Circ. 1986).

"Traders," on the other hand, are sellers of securities or commodities who "depend upon such circumstances as a rise in value or an advantageous purchase to enable them to sell at a price in excess of cost." Kemon, 16 T.C. at 1033. In contrast to dealers, traders "perform [] no merchandising functions nor any other service which warrants compensation by a price mark-up of the securities he or she sells." Id at 1032-1033; Diamond, 788 F.2d at 1029. A trader will be deemed to be engaged in a "trade or business" if his or her trading is frequent and substantial. King, 89 T.C. at 458. As the Wood Court observed, however, although "[g]enerally both dealers and traders will be engaged in a trade or business[,] only a dealer...has customers." 943 F.2d at 1052. In short, unlike a trader, a dealer in securities

or commodity futures can take advantage of the section 1221(1) exception to capital assets tax treatment because the later deals in property held "primarily for sale to customers in the ordinary course" or business. Id.; see also 26 U.S.C. #1221(1).

The foregoing cases illustrates that, even when a taxpayer is engaged in a trade or business of selling securities, the gains or losses derived from that activity are nonetheless capital in nature if the taxpayer has no customers. See Diamond, 788 F.2d at 1028; King, 89 T.C. at 458. In Diamond, for example, the Court of Appeals observed that the taxpayer's emphasis upon the significant financial and hourly commitment to securities trading "misses the crucial point that, whether or not his 1980 transactions amounted to a trade or business, he was not selling 'to customers' for the purposes of #1221(1).[2]

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[2] It is worth noting that the phrase "to customers" was added to the predecessor or #1221(1) to exclude from the definition of capital assets only those securities bought and sold by dealers, and not those traded by investors on their own account. See Mirro-Dynamics Corp. v. United States, 374 F.2d 14, 16 (9th Cir. 1967) (citing legislative history); see also MacAdam v. Commissioner, 62 T.C. Memo. 1991-410, 1991 WL 157917 (1991).

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Numerous cases demonstrate that a taxpayer who trades solely on his own account through a broker has no customers with respect to the securities so traded. Diamond, 788 F.2d at 1028 ("courts have clearly and consistently held that a taxpayer who trades securities for his own account does not sell 'to customers' within the meaning of #1221(1)"); Van Suetendael v. Commissioner, 152 F.2d 654 (2nd Cir. 1945) (per curiam). In the instant case, the Nordbergs admit both that their trading of securities in 1987 was exclusively for an account in their name at Shearson, Lehman Brothers and that they are aware of no facts or evidence that in 1987 they ever traded securities other than through a securities exchange. Government Exhibit 9 at p. 4.

Defendants attempt to avert summary judgment merely by reciting that " a significant factual issue in dispute in this case is whether [defendants] had 'customers'" and citing a dictionary definition of the term "customer" (i.e. "one that purchases a commodity or service"). Opposition at 9. Defendants further reason that:

> by that straightforward meaning of the term ,there could not have been sales

> (which there undisputedly were) in the absence of the "seller" (Paul Nordberg) having "customers." A "customer" is always needed for a sale to occur.

Id.

Several courts have, however, considered and rejected the argument that securities sold by taxpayers through a broker eventually reach customers. See e.g. George e. Warren Co. v. United States, 53 F. Supp. 578, 581 (D. Mass. 1944) ("[w]hile it may be contended that each time [the taxpayer corporation which was not a dealer in securities] sold the securities it dealt with a customer, such is not true within a fair reading of the taxing statute."); Mirro-Dynamics, 374 F.2d at 16 (rejecting taxpayer's argument that securities it sold eventually reached customers); Seeley v. Helvering, 77 F.2d 323, 324 (2nd Cir. 1935) ("So far as [the taxpayer] traded securities on his own account, his sales were on the exchange to persons whom he did not even know; these were not his customers.....").

In Swartz v. Commissioner, for example, the Tax Court dismissed the taxpayer's argument that his commodity contract trades, all of which were

made through Merrill Lynch or Prudential-Bache, were made to "customers." Rather, the Court observed that those brokerage houses "were not [taxpayer's] customers, but....[he] was one of their customers," and the court declined to regard as the taxpayer's customers "the nameless members of the commodity markets who ultimately purchased the commodity contracts [taxpayer] sold and sold the commodity contracts [he] purchased." T.C. Memo 1987-582, aff'd 876 F.2d 657 (8th Cir. 1989), cert. denied 494 U.S. 1006 (1990)

In short, if a taxpayer transacting in securities has no customers, then that taxpayer cannot, within the meaning of the second clause of a #122191), hold securities "primarily for sale to customers in the ordinary course of his trade or business." As the Fourth Circuit noted in Diamond,

> [t]he government's position....merely reflects the well-settled rule that a trader buying and selling securities exclusively for his own account does not sell 'to customers," whatever the character of his transactions.

788 F.2d at 1030.

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A taxpayer without customers likewise cannot satisfy the first clause of #1221(1), to wit, hold the securities as "stock in trade....which would properly be included in inventory of the taxpayer if on hand at the close of the taxable year." The general rules governing inventories are enumerated at section 471 of the Internal Revenue Code. See 26 U.S.C. #471. Tellingly, regulation 1.471-5, promulgated under that Code section, applies to taxpayers who are "dealers" in securities, and states that:

> For the purposes of this section, a dealer in securities is a merchant of securities...,with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom....Taxpayers who buy and sell securities for investment or speculation, irrespective of whether buying and selling constitutes the carrying on of a trade or business,...are not dealers in securities within the meaning of this section.

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Treas. Reg. 1.471-5 (emphasis added); see also Mirro-Dynamics, 374 F.2d at 16; Swartz v. Commissioner, 876 F.2d 657, 659 (8th cir. 1989) (rejecting taxpayer's argument that his commodities futures contracts were property he included in inventory at the end of each year, explaining that "[c]ommodity futures contracts are capital assets in the hands of a trader.") cert. denied, 494 U.S. 1006 (1990).

This Court concludes, therefore, that the securities that Mr. Nordberg purchased and sold for his own account at Shearson, Lehman Brothers were capital assets in his hands, and the losses from such trading were capital in nature.

ORDER

For the foregoing reasons:

1). The defendants' motion to compel [Docket #17] is **DENIED;**

2) The plaintiff's motion for summary judgment [Docket #20] is **ALLOWED;** and

3) The defendants' motion for judgment on the pleadings [Docket #11], the plaintiff's motion for partial summary judgment on defendants' counterclaim [Docket #12] and the plaintiff's motion for a protective order [Docket #18] are **DENIED AS MOOT.**

So Ordered.

s/Nathaniel M. Gorton
United States District
Judge

DATED: April 8, 1996

APPENDIX - NORDBERG V. UNITED STATES

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff(s)	)	
v.	)	CIVIL ACTION No. 93-12681-NMG
PAUL C. NORDBERG, and DEBRA L. NORDBERG, Defendant	)	

JUDGMENT

GORTON, D.J.

In accordance with this Court's Memorandum and Order issued on April 8, 1996, allowing plaintiff's Motion for Summary Judgment, it is hereby ORDERED;

Judgment for the plaintiff.

BY THE COURT,

S/ Deborah F. Shattuck,
Deputy Clerk in Charge

DATED: April 8, 1996

SECTION 23(r)
REVENUE ACT OF 1932

(r) LIMITATION ON STOCK LOSSES

(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations).

(2) Losses disallowed as a deduction by paragraph (1), computed without regard to any losses sustained during the preceding taxable year, shall, to an amount not in excess of the taxpayer's net income for the taxable year, be considered for the purposes of this title as losses sustained in the succeeding taxable year from sales or exchanges of stocks or bonds which are not capital assets.

(3) This section shall not apply to a dealer in securities (as to stocks and bonds acquired for resale to customers) in respect of transactions in the ordinary course of his

business,nor to a bank or trust company incorporated under the laws of the United States or of any State or Territory, nor persons carrying on the banking business (where the receipt of deposits constitutes a major part of such business) in respect of transactions in the ordinary course of such banking business.